

FILE COPY

Supreme Court of the United States

October Term—1946.

No. 967

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JOSEPH F. MAGGIO,

Petitioner.

—against—

RAYMOND ZEITZ, as Trustee in Bankruptcy of LUMA CAMERA
SERVICE, INC.,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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Of Counsel.

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Nature of Order

This case involves an order, dated April 30, 1945, adjudging petitioner Maggio in contempt of court in having willfully disobeyed a turnover order dated August 9, 1943 (84-92).¹ On November 11, 1946 the United States Circuit Court of Appeals for the Second Circuit unanimously affirmed said contempt order *sub nomine In re Luma Camera Service, Inc.* (37 at p. 37), with opinion appearing at pages 37-45 of the record and reported in 157 F. 2d 951.

The turnover order, the certificate of contempt, and the contempt order severally state that petitioner has now in his possession or under his control certain merchandise of the bankrupt of the cost value of \$17,500, or the proceeds thereof (22-27; 42-45; 84-85).

¹ All references are to the folios of the record.

The petition to punish for contempt and the reply affidavit state the facts as to petitioner's wilful failure to turn over said property to the trustee in bankruptcy (10-18; 67-72).

Petitioner's affidavit in opposition to the motion to punish for contempt and his petition to this Court² merely rehash certain issues involved in making the *antecedent* turnover order (59, 80). Petitioner did not show that since August 9, 1943, he had been deprived of possession of the property or had become unable to comply with the turnover order (44 at p. 42). He merely repeated his old story that he did not have the property in his possession at the time of the turnover order (59, 39 at p. 38).

The sole question in this case is whether the contempt order—not the *antecedent turnover order*—was properly made. The fundamental flaw in petitioner's argument lies in his failure to realize that this case does *not* involve the validity of the turnover order.

Prior Proceedings and Opinions

The time lapse between the making of the turnover order on August 9, 1943, its affirmance on November 13, 1944, the denial by this Court of certiorari on February 5, 1945, and the entry of the contempt order on June 5, 1945, was due solely to petitioner's assiduous exploitation of the possibilities of delay in his attempt to avoid compliance with the said turnover order. The turnover order was confirmed by the District Court on December 28, 1943. *In re Luma Camera Service, Inc.*, 57 F. Supp. 632. On November 13, 1944 it was affirmed by the Circuit Court of Appeals. *Zeitz v. Maggio*, 145 F. 2d (C. C. A. 2d), 241. On February 5, 1945,

² Pages 3 and 4 of the Petition.

this Court denied certiorari. *Maggio v. Zeitz*, 364 U. S. 841. On June 5, 1945 the contempt order was entered. On November 11, 1946, it was affirmed by the Circuit Court of Appeals. *In re Luma Camera Service, Inc.*, 157 F. 2d (C. C. A. 2d) 951.

In affirming the said contempt order the Circuit Court of Appeals held (44 at p. 42; 157 F. 2d 951 at p. 954):

"With the turnover order once sustained, the contempt order necessarily followed. For, under Oriel v. Russell, 278 U. S. 358, the findings made in connection with the turnover order were res judicata in the contempt proceedings."

Statement of the Case

Respondent controverts as erroneous petitioner's "Summary Statement of Matters Involved". It is merely a rehash of contentions made many times below, in the District Court, the Circuit Court of Appeals and in this Court concerning the validity of the *turnover* order. That is not *this* case. This case concerns the validity of the contempt order. The facts set forth under the heading "Nature of Order" at pages 1 and 2, *supra*, constitute a concise and correct statement of this case.

For a complete and accurate statement of the facts concerning the other—the prior concluded case in respect of the turnover order—this Court is respectfully referred to the opinion of the District Court in *In re Luma Camera Service, Inc.*, 57 F. Supp. 632, affirmed without opinion, *Zeitz v. Maggio*, 145 F. 2d (C. C. A. 2d) 241.

¹ Italics in this and subsequent quotations are ours, unless otherwise indicated.

Argument

I. The petition presents no question of law worthy of review by this Court whose decision in the *Oriel* case clearly and completely determines this case.

II. The contempt order was made upon due notice to petitioner and only after ample opportunity had been given him to be heard in the proceedings culminating in the said order.

III. The interests of justice require that there be no further delay in enforcement of the contempt order.

POINT I

The petition presents no question of law worthy of review by this Court whose decision in the *Oriel* case clearly and completely determines this case.

The threshold proceedings in respect of the turnover order and whatever questions may have been involved therein are no longer here. *Oriel v. Russell*, 278 U. S. 356, is determinative on that point. In that case, in contrast to this, the petitioner had not had the benefit of a review on appeal of the validity of the turnover order. Nevertheless, this Court held (p. 363):

“ . . . Being made, it should be given weight in the future proceedings as one that may not be collaterally attacked by an effort to try over the issue already heard and decided at the turnover.”

The turnover order having been made, this Court further held (p. 363):

“ * * * Thereafter on the motion for commitment the *only* evidence that can be considered is the evidence of something that has happened since the turnover order was made, showing that *since* that time there has *newly* arisen an inability on the part of the bankrupt to comply with the turnover order.”

Petitioner in his brief in the Circuit Court of Appeals conceded “that the turnover order of August 9th, 1943 may not be collaterally attacked”. He did not attempt to give any evidence of a present inability to comply with the turnover order, caused by a factual situation which had developed since its entry.

In this respect the Circuit Court of Appeals in affirming the contempt order herein held (44 at p. 42):

“As Maggio made no such showing of an intervening change of facts, there was no error in the entry of the contempt order.”

Petitioner merely alleged in his affidavit in opposition to the motion to punish for contempt that he did not have the property in his possession at the time of the turnover order (59, 80)—an issue decided against him by the turnover order—and that he has been suffering from a purported “heart complaint” since 1941 (61, 64-66). Petitioner’s contention that he did **not** have the property in his possession at the time of the turnover order was also made in his petition for a writ of certiorari to review the turnover order which was denied by this Court. *Maggio v. Zeitz*, 364 U. S. 841.

The present petition is in its entirety merely another attack upon the turnover order in terms which, as appears from the petition, were rejected in the antecedent original proceedings and appeals. The present petition is—except for fragmentary excerpts from the opinion of the court below—a carbon copy of the prior petition to this Court for certiorari to review the turnover order which this Court denied. *Maggio v. Zeitz*, 364 U. S. 841.

Points A and C of the present petition are fashioned after Points A and B of the prior petition. None of the cases cited in Points A and C of the present petition is in point for this case does *not* involve the validity of the turnover order.

This Court on May 6, 1946, in a similar case, *Jeskowitz v. Carter*, Supreme Court, Law ed., Advance Opinions, Vol. 90, No. 14,914, denied certiorari to review an order adjudging Jeskowitz in contempt of court in having wilfully disobeyed a turnover order. There, Jeskowitz likewise denied that he "has possession or control of the property in question".⁴ Prior thereto and on December 11, 1944, this Court had denied certiorari, *Jeskowitz v. Carter*, 323 U. S. 787, to review a turnover order dated February 23, 1943, although, in a concurring opinion affirming the turnover order one of the judges of the Circuit Court of Appeals had expressed the hope that this Court might grant certiorari to consider the presumption of continuance of possession. *Cohen v. Jeskowitz*, 144 F. 2d (C. C. A. 2d) 39, 40.

The contempt order in this case was affirmed by the Circuit Court of Appeals on the principles laid down by this Court in the *Oriel* case. It is submitted that no question of law worthy of review by this Court exists in this case.

⁴ Folio 102 of the record in that case.

POINT II

The contempt order was made upon due notice to petitioner and only after ample opportunity had been given him to be heard in the proceedings culminating in the said order.

There is no merit in petitioner's contention in Point B of his petition that the contempt order violates the Fifth and Eighth Amendments of the Constitution. The record establishes that petitioner received due notice of all proceedings resulting in the contempt order (19-51, 85-87).

Ample opportunity was given him to be heard in those proceedings. No one prevented him from showing therein present inability to comply with the turnover order caused by a factual situation which had developed since the entry of the turnover order. Instead of availing himself of that opportunity, petitioner sought only to show that he did not have the property in his possession at the time of the turnover order and to rehash the questions of law and fact involved in the *antecedent* original proceedings and appeals before the referee, the District Court, the Circuit Court of Appeals and this Court.

The District Court read, studied and considered petitioner's affidavits in opposition to the motion to punish him for contempt as well as the brief of his attorney (84-88). The matter came on for final hearing April 10, 1945 (85). The matter was argued by counsel (87). The District Court rendered an opinion and made findings of fact and conclusions of law (78-83).

Petitioner submitted *no* probative evidence tending to show he is suffering from a "heart complaint". It is significant that the medical report referred to by petitioner at page 5 of the petition herein flatly contradicts petitioner's

assertion that he is suffering from a "heart complaint". That report is dated May 10, 1945 and states in part:

"In 1941 the patient [petitioner] began to have attacks of substernal pressure lasting 10 to 15 minutes. * * *

* * *

"CONCLUSIONS AND RECOMMENDATIONS:

"The most obvious abnormality in Mr. Maggio's case is cholelithiasis, and most of his symptoms may be due to this cause. *There is no evidence in our examinations that he has objective signs of coronary artery disease. His electrocardiograms, both regular and after exercise, are normal, as is his sedimentation index. His blood count is not markedly abnormal* * * *"

The Circuit Court of Appeals in respect of petitioner's purported illness held (45 at p. 43):

"But, even so, Maggio's [petitioner's] malady is surely irrelevant— * * * he could easily have avoided the effect of imprisonment on his health by immediately surrendering the merchandise to the trustee * * *. (The) situation is precisely the same as if a man, who had been ordered by a court to execute a deed, sought, on a plea of ill-health, to avoid commitment for contempt for disobeying the order."

There is no merit in petitioner's statement that the contempt proceedings are barred by lapse of time. Only one year and four months elapsed between the making of the turnover order and the service of the petition to punish for contempt. In the interim petitioner had appealed to the District Court, to the Circuit Court of Appeals and had

petitioned this Court for certiorari to review the turnover order. If delay there was, it was caused solely by petitioner's exploitation of the possibilities thereof by unmeritorious appeals and applications.

Petitioner has wilfully disobeyed the turnover order. He has proffered no proof establishing present inability to comply therewith, caused by a factual situation which has developed since the entry of said order. His own papers conclusively prove that he never suffered from a "heart complaint". There was nothing to be tried that could properly have been tried unless the turnover proceedings were to be reopened.

POINT III

The interest of justice requires that there be no further delay in enforcement of the contempt order.

Petitioner's alleged reasons for granting certiorari are a confused inversion of the principles of the *Oriel* case and other applicable cases including

In re Romy Liquor Corporation, 107 F. 2d (C. C. A. 7th) 533;

In re Williams Supply Co., Inc., 77 F. 2d (C. C. A. 2d) 909;

In re Oriel, 23 F. 2d (C. C. A. 2d) 409, affirmed *sub nomine Oriel v. Russell*, 278 U. S. 358;

The attempt to compel petitioner to comply with the turnover order has thus far been thwarted at every turn. The turnover order was made August 9, 1943. It was confirmed by the District Court December 28, 1943. It was affirmed by the Circuit Court of Appeals November 13,

1944. Certiorari was denied by this Court February 5, 1945.

The certificate of contempt was dated December 4, 1944 (42-45). The motion to punish for contempt was returnable December 13, 1944 (6) and was finally decided April 18, 1945 (83). The order granting that motion is dated April 30, 1945 (91). That order was stayed pending the hearing and determination of petitioner's appeal therefrom. On November 11, 1946 the Circuit Court of Appeals unanimously affirmed that order (37 at p. 37). Petitioner now counters with a petition to this Court for certiorari to review that order of affirmance. All proceedings under the contempt order pending the hearing and determination of this application have been stayed.

The practical effect of petitioner's argument is that, having thus far thwarted the trustee in bankruptcy by exploitation of every technicality to avoid compliance with the turnover order, he should now be given another opportunity to repeat his old story that he never was able, and, therefore, is not now able to comply with the turnover order (59). On that appellant is precluded. *In re Luma Camera Service, Inc.*, pages 37-45, record, 157 F. 2d (C. C. A. 2d) 951; *In re Arctic Leather Garment Co., Inc.*, 106 F. 2d (C. C. A. 2d) 99, 100; *In re Steinreich Associates Inc.*, 83 F. 2d (C. C. A. 2d) 254, 255.

In *In re Arctic Leather Garment Co., Inc.*, 106 F. 2d (C. C. A. 2d) 99, it was held (p. 100):

" . . . The appellant was given full opportunity to be heard. But he merely repeated the old story, that no such property had ever existed, and on that issue the turnover order was of course a binding adjudication against him. *Oriel v. Russell, supra.*"

The interests of justice require that the order punishing petitioner for contempt be not thwarted again.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
February 24, 1947.

Respectfully submitted,

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